5-27-1976

Billy Ray Brewer v. Commonwealth of Kentucky

Appellant's Brief 1976-SC-0361

APPELLANT'S BRIEF

550 SW2d 474

SUPREME COURT OF KENTUCKY

FILE NO. 76-361

BILLY RAY BREWER — APPELLANT

VS.

APPEAL FROM MARTIN CIRCUIT COURT
HON. W. D. SPARKS, JUDGE
INDICTMENT NO. 648

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLANT

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CERTIFICATE OF SERVICE:

I hereby certify that a copy of the foregoing Brief For Appellant has been mailed postage prepaid, to Hon. W. D. Sparks, Judge, Martin Circuit Court, Martin County Courthouse, Inez, Kentucky 41224; Hon. Eugene C. Rice, Commonwealth Attorney, 24th Judicial District, Inez, Kentucky 41224; and Hon. Robert F. Stephens, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 19th day of May, 1976.

Timothy T. Riddell

TABLE OF CONTENTS AND AUTHORITIES

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* * * * * * * * * *

MAY IT PLEASE THE COURT:

STATEMENT OF QUESTIONS PRESENTED

I.

DID THE TRIAL COURT DENY APPELLANT A FAIR TRIAL BY ALLOWING THE INTRODUCTION OF A STATEMENT PROCURED FROM APPELLANT IN VIOLATION OF MIRANDA?

II.

SHOULD THE JUDGMENT IN APPELLANT'S CASE BE VACATED BECAUSE OF THE FAILURE OF THE COURT BELOW TO FOLLOW THE SENTENCING PROCEDURES OF KRS 532.050 AND KRS 533.010?

STATEMENT OF THE CASE

Appellant, Billy Ray Brewer, was indicted by the Martin County Grand Jury on October 28, 1975 and was charged with unlawfully taking or exercising control over a 1975 Honda trail bike with the intent to deprive the owner, Martin Joseph Stepp, thereof in violation of KRS 514.030(1)(a) (Transcript of Record hereinafter, T.R., p. 1).

On that same day he was appointed counsel and with said counsel he waived formal arraignment and entered a plea of not guilty to the crime charged in Indictment No. 648 (T.R., p. 5).

On November 12, 1975, the trial court, after "having been advised in detail by the Jailer of Martin County who ha[d] observed the conduct of the [Appellant]" while Appellant was in jail and after "having been made aware of other factors otherwise bearing upon the [Appellant's] mental disposition" ordered Appellant sent to Eastern State Hospital in Lexington for thirty (30) days of treatment and for a determination of his competency to stand trial (T.R., p. 6).

Only three days later after a single interview, Doctor Tom M. Hall, certified Appellant competent to stand trial (T.R., pp. 8-9). However, Dr. Hall did note that because of the single interview he was unable to determine whether Appellant committed the crimes because of some psychological or organic dysfunction (T.R., p. 8). Dr. Hall finally recommended that Appellant be subjected to "more extensive psychological and neurological evaluation at the U. K. Medical Center" (T.R., p. 9). Although Dr. Hall set up a tentative appointment for this recommended further evaluation, the record is silent as to whether the tests were actually carried out.

Appellant's case came to trial on December 2, 1975 (T.R., p. 20). Testimony was introduced on both sides and the jury was duly instructed. After deliberating the jury returned a verdict finding Appellant guilty and assessed his penalty at one year (T.R., pp. 19-20; Transcript of Evidence hereinafter T.E., p. 44).

Some two days later Appellant's trial counsel filed a Motion For New Trial (T.R., pp. 21-22). On December 8, 1975

the trial court summarily overruled said motion (T.R., p. 23).

On that same day Appellant filed notice of his intentions to appeal from the final judgment in his case (T.R., p. 24). Accordingly Appellant now prosecutes this appeal.

ARGUMENTS

I.

THE COURT BELOW DENIED APPELLANT A FAIR TRIAL WHEN IT ALLOWED THE INTRODUCTION OF A STATEMENT PROCURED FROM APPELLANT IN VIOLATION OF MIRANDA.

The most damaging evidence against Appellant was a statement procured from him while he sat in the Martin County Jail without the benefit of an attorney. Because of the peculiar facts of Appellant's crime and because of the psychological evaluation made of Appellant at Eastern State, a reasonable question was raised as to whether Appellant could have knowingly and intelligently waived his Miranda rights before giving the statement in question. Despite the evidence adduced at trial the court below determined that the statement was not constitutionally infirmed (T.E., p. 19; T.R., p. 23). Appellant submits that the trial court's finding on this matter was clearly erroneous.

At the outset it must be remembered that according to the Eastern State Social Work Services Preadmission Screening Note dated November 15, 1975 Appellant not only evidenced a "low functioning intellectual level" but he also manifested "poor insight and judgment" (T.R., p. 12).

The fact that Appellant was suffering from poor insight can best be seen during that critical time when Appellant was approached by Trooper Bob Kilgore while Appellant sat in the Martin County Jail. According to Kilgore after he advised Appellant of his Miranda rights Appellant allegedly stated that he understood

them with one breath while with the next he stated that "he would like an attorney for his trial" (T.E., p. 20). Because of this rather confused answer, Kilgore again asked Appellant specifically "Do you understand your rights?" (Id.). To this query Appellant unresponsively answered "I will tell you anything you want to know" (T.E., pp. 20, 21).

Because the testimony of Kilgore established that Appellant was confused (at the least) during the interrogation in jail,[1] Appellant was closely examined during his trial testimony as to exactly what he thought was going on during that interrogation.

Appellant, a nineteen (19) year old illiterate (T.E., pp. 35-36), stated that he did not have any idea what the statement in issue meant and that although he remembered signing it he did not understand what it was for (T.E., pp. 36-37). It must be remembered that the Commonwealth failed to refute the fact that Appellant did not fully comprehend what was occurring during the entire interrogation.

Later, doubts about the truth of the contents of the statement were raised when Appellant testified that he could not remember whether or not he took the Honda (T.E., p. 37).

Despite all these facts the trial court not only failed to suppress the statement when requested to do so by Appellant's trial counsel during trial (T.E., pp. 21-23), but it also refused to grant Appellant a new trial after Appellant's trial counsel averred in the motion for same that Appellant did not "knowingly, wilfully and intelligently" waive his Miranda rights (T.R., p. 21).

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[1]The Martin County jailer, Arvil Horn, admitted that Appellant, while in jail, did not seem normal to him (T.E., p. 32).

Appellant submits that he was denied a fair trial when the trial court allowed into evidence Appellant's extra-judicial statement which was procured while Appellant was without the assistance of counsel and after Appellant failed to knowingly and intelligently waive his Miranda rights.

In its decision in Miranda v. Arizona, 384 U.S. 436 (1966), the Supreme Court of the United States recognized that a defendant, when being interrogated in custody by the police must have his privilege against self-incrimination and his right to counsel protected by certain procedural safeguards. In the words of the Court, the defendant "must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney and that if he cannot afford an attorney one will be appointed for him prior to any question if he so desires." Id. 384 U.S. at 479.

It is readily admitted that once these warning are given, a defendant may waive these rights and anything that he says thereafter may be used against him. But the Supreme Court insisted that these rights may not be waived unless a defendant "knowingly" and "intelligently" did same. And further "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." Id. 384 U.S. at 475. And finally the Supreme Court stated without equivocation that "[t]he warnings required and the waiver necessary in accordance with our opinion today are . . .prerequisites to the admissibility of any statement made by a defendant." Id. 384 U.S. at 476 (Emphasis supplied).

It is obvious when considering the foregoing facts with the above delineated law that the Commonwealth failed to meet the heavy burden imposed upon it by the Supreme Court of the United States. It failed to establish that Appellant had sufficient understanding not only of the rights read to him by Kilgore but also of the whole interrogation. The reason for this failure is simple, it is clear from the record that Appellant just did not understand what was going on during the interrogation (T.E., pp. 35-37).

Even though the Commonwealth failed to demonstrate that Appellant "knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel"(Miranda v. Arizona, supra, 384 U.S. at 475) the trial court allowed them to introduce and use the statement illegally procured from Appellant (T.E., p. 23). This action of the trial court fatally tainted Appellant's right to a fair trial.

Accordingly, this Court should reverse Appellant's conviction and remand this case to the Martin Circuit Court with directions to afford Appellant a fair trial.

II.

THE JUDGMENT IN APPELLANT'S CASE SHOULD BE VACATED BECAUSE THE COURT BELOW FAILED TO FOLLOW THE SENTENCING PROCEDURES OF KRS 532.050 AND KRS 533.010.

On December 3, 1975 the court below entered judgment in Appellant's case and formally sentenced Appellant to one year at hard labor in the State Penitentiary (T.R., pp. 26-27). It is apparent from the record that the court failed to follow the mandatory presentencing and sentencing proceedings implemented in the Kentucky Penal Code. Accordingly Appellant is entitled to have the judgment against him vacated and to further have his case remanded to the Martin Circuit Court for a proper sentencing.

The Legislature in 1974 implemented two important statutes setting up the procedures that must be followed before a valid judgment can be entered. KRS 532.050 provides in part:

> (1) No court shall impose sentence for conviction of a felony, other than a capital offense, without first ordering a presentence investigation and giving due consideration to a written report of such investigation.
>
> . . .
>
> (4) Before imposing sentence, the court shall advise the defendant or his counsel of the factual contents and conclusions of any presentence investigation or psychiatric examinations and afford a fair opportunity and a reasonable period of time, if the defendant so requests, to controvert them. The sources of confidential information need not, however, be disclosed.

The Commentary to this section makes it abundantly clear why the Legislature intended that the following of the procedures delineated in subsection one of the above mentioned statute be a condition precedent to imposition of any valid sentence:

> In deciding upon the disposition of a convicted offender, especially with the many alternatives provided by this Code, a court cannot be expected to discharge its responsibilities without full and accurate information about that offender. Such information usually cannot be gained from a trial of the charges resulting in the conviction. This is especially true where the power to assess the quantity of punishment is left, at least in part, for the jury. In recognition of this, subsection (1) requires a trial judge to receive and consider a presentence report about all persons convicted of felonies. While this provision might be considered to be "procedure" and inappropriate for a code of "substance," the matter of presentence information is considered so essential to the sentencing objectives of this chapter that the provision cannot be left for promulgation elsewhere. KRS 532.050 COMMENTARY (Emphasis supplied).

Ms. Brickey, in her treatise, succinctly delineates what ends the procedures of KRS 532.050(1) were intended to meet:

> Prior to imposing a sentence the court is required to give due consideration to the written presentence investigation report. It is anticipated that the additional information gained by this process will enable the court to better evaluate the sentencing alternatives provided in the Penal Code and, to a certain extent, to individualize the sentence in a manner which will promote the rehabilitative goals of the correctional process. Brickey, Kentucky Criminal Law, §29.02.

The sentencing alternatives referred to above are found in KRS 533.010. At the outset it must be remembered that the Legislature in enacting that statute (KRS 533.010) established a policy in favor of rehabilitating convicted felons within the community while they are free of incarceration. KRS 533.010, COMMENTARY (1974). Nothing could demonstrate this more than the language of the statute:

> (1) Any person who has been convicted of a crime and who has not been sentenced to death may be sentenced to probation or conditional discharge as provided in this chapter.
>
> (2) Before imposition of a sentence of imprisonment the court shall consider the possibility of probation or conditional discharge. After due consideration of the nature and circumstances of the crime and the history, character and condition of the defendant, probation or conditional discharge should be granted unless the court is of the opinion that imprisonment is necessary for protection of the public because:
>
> (a) There is substantial risk that during a period of probation or conditional discharge the defendant will commit another crime; or
>
> (b) The defendant is in need of correctional treatment that can be provided most effectively by his commitment to a correctional institution; or
>
> (c) A disposition under this chapter will unduly depreciate the seriousness of the defendant's crime. (Emphasis supplied).

Two important changes in our old scheme of probation have resulted from the enactment of that statute. The trial court now has an affirmative duty to consider placing an offender on probation or conditional discharge. KRS 533.010(1). Thus that offender no longer has to so move the court. Second, and most important, the trial court is mandated to place an offender on probation or conditional discharge "unless the court is of the opinion that imprisonment is necessary for protection of the public." KRS 533.010(2). The Legislature provided the trial courts with strict guidelines to determine whether such imprisonment is necessary. See KRS 533.010(2)(a-c). It is clear that the Legislature intended that the existence of these three criteria be a condition precedent to the imposition of any sentence of imprisonment.

The record in the case at bar is devoid of any indication that the trial court evaluated Appellant individually or that the trial court found that there was a "substantial risk" that Appellant would commit another crime while on probation or that Appellant was in need of the type of correctional treatment that could only be provided in a correctional institution or that placing Appellant on probation would "unduly depreciate" the seriousness of his crime. (See Judgment T.R., pp. 26-27).

In the absence of any such indication it can only be assumed that the court below failed to heed the mandate of the Legislature by neglecting to follow the sentencing procedures of KRS 533.010. It is also clear that the court below failed to order and use the presentence investigation as mandated by KRS 532.050(1). Since following these procedures is a condition precedent to the imposition of a valid sentence, this Court should vacate the judgment in Appellant's case and remand it to the Martin Circuit Court with directions to utilize the

provisions of KRS 532.050 and KRS 533.010 in sentencing Appellant.

CONCLUSION

For the above stated reasons Appellant respectfully requests this Court to grant him any and all relief to which he is entitled.

Respectfully submitted,

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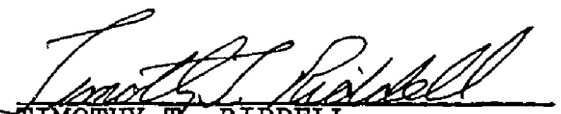
BY: 
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